

OPINION
61-140

February 20, 1961 (OPINION)

LEGISLATURE

RE: Elections - Validity

This office acknowledges receipt of your letter of February 4, 1961, in which you enclosed House Resolution No. 5, a house resolution requesting an opinion from the attorney general in regard to elections held in the Ninth and Tenth Legislative Districts for the election of members of the legislative assembly.

Insofar as the question of the election of the members of the House of Representatives from the Ninth and Tenth Districts is concerned, the House has already pointed out in their resolution that under Section 47 of the North Dakota Constitution, "Each house shall be the judge of the election returns and qualifications of its own members." In view of this constitutional provision there is little that this office or for that matter any court can say or do with regard to the election of members who have already been seated in the house.

Our Supreme Court discussed and emphasized this unambiguous constitutional provision in *State v. District Court of Sixth Judicial District*, 67 N.D. 196, 271 N.W. 137. The case leaves little doubt but that a determination of a contested seat in the House of Representatives rests with that body. See also 81 CJS, 943, States section 34; 49 Am. Jur. 251, STATES, Section 34.

This being the case there is no authority or precedent in this state by which we may be guided in the present situation. Furthermore the constitutions of most, if not all, of the states contain provisions to the effect that each house of the state Legislature shall be the judge of the election and qualifications of its won members. Thus a question such as the one at hand has not, to our knowledge, been discussed by the courts. If such a case is brought before the courts they progress no further than to discuss the constitutional provisions and declare that questions of qualifications of members of the Legislature must be decided by the Legislature. Therefore, seldom, if ever, have the courts discussed the merits of a situation such as the one presented to this office by the House of Representatives. I believe that in view of these facts it would be presumptuous of us to attempt to advise the House of Representatives on such a question. Such advice would serve no useful purpose.

It should be noted, however, that the election of the representatives in question would appear to be valid until decided otherwise to the satisfaction of the House. In addition, the question of whether a person is entitled to represent a certain district in the Legislature, because of a dispute as to the boundaries of the legislative district, should be raised at the time such persons seek election. At such a time the courts may take jurisdiction of these

questions and resolve them prior to the time that the election is held and the names of the victorious certified according to law.

It should also be noted that the election was apparently presumed valid by all concerned since no question as to its validity has been raised prior to this time. The members of the House of Representatives affected by this situation appear to be true choices of the people they presently represent in the Legislature. There was apparently no intent on the part of any person to thwart any provision of our election statutes.

I may say that a representative of this office went to Fargo and interviewed the state's attorney of Cass County and the deputy county auditor of said county and both officials stated that there never had been filed a single complaint with regard to the general election of 1960.

There is absolutely no evidence of fraud or collusion there with regard to the election of these representatives and the present situation has arisen because of a mistaken notion as to the boundary line between the two districts. This all came to light after the Legislature was well under way and while this office stands all unequivocally on the opinion which it rendered relative to the matter, it must be borne in mind that it has never been adjudicated by any court.

LESLIE R. BURGUM
Attorney General